Supreme Court, U.S.
FILED
06-1421 APR 24 2007
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

WILHELMENA COOK, PETITIONER

v.

DIANA HAYS AND OPTIONS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Donald Juneau
Counsel of Record
P.O. Box 1857,
(214 S.W.Railroad Avenue)
Hammond, Louisiana
70404-1857
Telephone:[985] 429-0830
FAX: [985] 542-0046

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Whether the exemption for "sitters" and "companions" embodied in the 1974 amendment of the Fair Labor Standards Act, 29 U.S.C. § 231(a)(15), applies to domestic service workers who are employed full-time by a third-party employer, but who are not the recipients of specialized medical or social-welfare training?

2. Whether the Regulation of 29 C.F.R. § 552.6 has been correctly applied to the Petitioner, as to require specialized medical or social-welfare training for direct care-workers and whether such an interpretation is entitled to deference under this Court's holding in *Chevron,U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837(1984), as modified by *United States* v. *Mead Corp.*, 553 U.S. 218 (2001) ?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 4

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 10

APPENDIX

Circuit Court Opinion 1a

District Court Decision 4a

Order Denying Rehearing 7a

TABLE OF AUTHORITIES

Page

CASES

CHEVRONU.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL, 467 U.S. 837 (1984) 6

COX V. ACME HEALTH SERVICES, 55 F.3D 1304, 1306-1310 (7TH CIR. 1995) 9

GENERAL DYNAMICS LAND SYSTEMS, INC. V. CLINE, 540 U.S. 581 (2004) 8, 9

HOME, LTD. V. COKE, 127 S.CT. 853 (2007) 4, 5

HOME, LTD., 376 F.3D 118 (2D CIR. 2004) 5, 6, 7, 8

MAGISTRATE JUDGE, 42 F.SUPP.2D 1231 (N.D. OKLA. 1999) 9

MCCUNE V. OREGON SENIOR SERVICES DIVISION, 894 F.2D 1107 (9TH CIR. 1990) 9

SALYER V. OHIO BUREAU OF WORKERS' COMPENSATION, 83 F.3D 784, 787-788 (6TH CIR.) CERT. DENIED 519 U.S. 964 (1996) 9

TENNESSEE COAL, IRON & R. CO. V. MUSCODA LOCAL NO. 123, 321 U.S. 590, 592 (1944) 8, 10

TERWILLIGER V. HOME OF HOPE, INC., 21 F.SUPP.2D 1294, 1301-1303 (N.D. OKLA. 1998) 9

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 213 8

29 U.S.C. § 213(A)(15) (2005) 1, 6

REGULATIONS

29 C.F.R. § 552.109(A) (2005) 3, 6

29 C.F.R. § 552.3 (2005) 2

29 C.F.R. § 552.6 6

66 FED. REG. 5481 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 2006 U.S.App. LEXIS 32070 (5th Cir., Dec. 29, 2006). The opinion of the United States District Court for Eastern Louisiana is reported at 2006 U.S.Dist. LEXIS 36009 (E.D. La., May 31, 2006).

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the district court's judgment, was handed down on December 29, 2006. A timely petition for rehearing was denied on February 15, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

1. Fair Labor Standards Act, 29 U.S.C. § 213(a)(15) (2005):

> Sec. 213. Exemptions
> (a) Minimum wage and maximum hour requirements
> The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to--
> * * *
> (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide

> companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)***.

2. Fair Labor Standards Act Regulation, 29 C.F.R. § 552.3 (2005):

> Sec. 552.3 Domestic service employment.
> As used in section 13(a)(15) of the Act, the term domestic service employment refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

3. Fair Labor Standards Act Regulation, 29 C.F.R. § 552.6 (2005):

> Sec. 552.6 Companionship services for the aged or infirm.
> As used in section 13(a)(15) of the Act, the term companionship services shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the

aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household.

4. Fair Labor Standards Act Interpretive Regulation, 29 C.F.R. § 552.109(a) (2005):

Subpart B-Interpretations
Sec. 552.109 Third party employment.
(a) Employees who are engaged in providing companionship services, as defined in Sec. 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15). Assigning such an employee to more than one household or family in the same workweek would not defeat the exemption for that workweek, provided that the services rendered during each assignment come within the definition of companionship services.

STATEMENT

This case raises an important issue of the coverage of the overtime provisions of the Fair Labor Standards Act. On January 5, 2007, this Court granted certiorari to the United States Court for the Second Circuit in *Long Island Care at Home, Ltd.* v. *Coke*, 127 S.Ct. 853 (2007), No. 06-593, O.T. 2006, and briefing in that case is now under way. The issues in this case are identical with those in *Coke*, namely, whether persons employed full-time by a third party, providing direct care to individuals, are covered by the overtime provisions of the Fair Labor Standards Act, and are not exempted from coverage as providers of "companionship services."

The late Wilhelmena Cook was a full-time employee of Options, Inc., and provided direct-care to an individual; she worked seven days a week, at least eight hours per day, but circumstances often constrained her to remain with the patient long past the eight hours of her shift. There were times when Ms Cook had to work five days, twenty-four hours straight. Ms Cook brought suit in Louisiana state district court for damages for wrongful termination of employment by Options, Inc., and included a claim for non-payment of overtime benefits by Options, Inc. The case was removed to the United States District Court for Eastern Louisiana on the federal-question basis that her claim for overtime was under the Fair Labor Standards Act. After discovery, plaintiff Cook moved for partial summary judgment and Options, Inc., cross-moved for summary judgment. The district court granted summary judgment for Options, Inc., holding that Ms Cook was exempt from coverage of the Fair

Labor Standards Act overtime provisions because "she provided mainly companionship services" and thus fell under the companionship exemption of the Fair Labor Standards Act, due to the fact that her training and duties fell short of the criterion for "trained personnel." *Cook* v. *Hays*, 2006 U.S. Dist. LEXIS 36009 (E.D. La., May 31, 2006), at *3. After denying Ms Cook's motion for new trial, appeal was timely noticed to the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals affirmed the district court, holding that because Ms Cook "served as a full-time direct care worker during her employ, wherein she completed tasks set out in the comprehensive Plan of Care," her "duties qualify as companionship services," and thus she was exempt from coverage under the Fair Labor Standards Act. *Cook* v. *Hays*, 2006 U.S.App. LEXIS 32070, 153 Lab. Cas. (CCH) P35,236, 12 Wage & Hour Cas.2d (BNA) 228 (5th Cir., Dec. 29, 2006), at *2, *3. Petitioner timely filed a motion for panel re-hearing, which was denied on February 15, 2007.

REASONS FOR GRANTING THE PETITION

A. *Conflict among the Circuits.*

The decision of the Fifth Circuit against the late Ms Cook is in conflict with the decisions in the United States Court of Appeals for the Second Circuit in *Coke* v. *LongIsland Care at Home, Ltd.*, 376 F.3d 118 (2d Cir. 2004), *judgment vacated and remanded*, 545 U.S. 1103 (2006), *re-affirmed on remand*, 462 F.3d 48 (2d Cir. 2006), *cert. granted sub nom. Long Island Care at Home, Ltd.* v. *Coke*, 127 S.Ct. 853 (2007). In *Coke*, the Second Circuit held, reaffirming this holding on the

first remand from this Court, that direct-care workers, such as Ms Cook, were not exempted from overtime-pay coverage by the Fair Labor Standards Act. The Second Circuit held that the Interpretive Regulation of 29 C.F.R. § 552.109(a) was not entitled to deference under this Court's holding in *ChevronU.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). The Fifth Circuit, however, did not invoke the *Chevron* rule, although it did cite 29 C.F.R.§ 552.6, and, without specifically holding that that regulation covered the situation, determined that Ms "Cook's duties qualify as companionship services." *Cook* v. *Hays*, supra, 2006 U.S. App. LEXIS 32070, at *3. Nor did the Fifth Circuit consider or apply 29 C.F.R. § 552.109(a), the interpretive regulation, but confined its analysis to the language of 29 U.S.C. § 213(a)(15) and 29 C.F.R. § 552.6.

B. *Decision Below Incorrectly Applies Fair Labor Standards Act and its Regulations.*

It is Petitioner's contention that the Fifth Circuit incorrectly applied the Labor Department regulation of 29 C.F.R. § 552.6 to her situation. The Second Circuit in *Coke* had rejected a challenge to this regulation on its face, holding that while "companionship services" is "a vague term with no obvious plain meaning," the Court did find "[m]ore troubling the second sentence of the regulation, which is not delimited by the twenty percent rule." *Coke* I, supra, 376 F.3d, at 127. The Court found that the regulation "is ambiguous on the question of whether the first sentence of the regulation must be satisfied–that an employee must first provide 'fellowship, care, and protection'–before proceeding to the inquiry about

whether to exempt the 'related' household work." *Coke* I, supra, 376 F.3d, at 128. Because Coke had made a facial challenge to the regulation, rather than focussing on one "'as applied' to any particular class of employees," the Court could not "rule out the possibility of an application that would contravene the plain statutory mandate, but because there are many applications of the regulation that are consistent with the statute, we cannot declare it invalid on its face. *** In any event, Coke presents no facts upon which we could conclude that the agency has ever applied the regulation in the purportedly impermissible way she envisions." Id. Citations omitted.

In this case, by contrast, the petitioner mounted a particularized challenge to a mechanical application of § 552.6 which would place her under the exemption because she was not a species of "trained personnel." This led to the conclusion "that Cook's duties qualify as companionship services" under § 552.6. *Cook*, supra, 2006 U.S.App.LEXIS 32070, at *2-*3. The Court below based its analysis on its perception that § 552.6 placed domestic service employees lacking such training under the exemption. Id. Under this view, only if a person were a "trained professional" would that person not be exempted from coverage under the Fair Labor Standards Act, even though that trained person does provide "companionship services," since this category of services, which "require and are performed by trained personnel," takes such an employee out of the exclusion.

This is not what Congress intended when it tailored this narrow exclusion back in 1974. Since its enactment in 1938, the Fair Labor Standards Act

contained provisions relating to the payment of overtime. In its first definitive treatment of the statute, this Court laid down the principle that the coverage of the Act was to "be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion." *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 592 (1944).

In 1974, when Congress broadened the coverage of the Fair Labor Standards Act to embrace domestic service employees, it tailored a very narrow and restrictive exemption exempting "companionship services" providers from the larger category of direct-care domestic workers, in 29 U.S.C. § 213 (a)(15). The overarching principle of the 1974 amendments was their broad coverage over domestic services workers. While section 552.6 does speak of "trained personnel," the provision certainly does not require that a domestic service worker must be the recipient of such specialized training in order to escape from the exemption, especially when the legislative history is taken into account. *See* S.Rep. No. 93-690, 93d Cong., 2d Sess. at 20 (1974); H.R.Rep. No. 93-913, 93d Cong., 2d Sess. at 35-36 (1974), 1974 U.S.Code Cong. & Admin.News at 2811, 2845; *see also* the discussion of the 1974 Congressional debates in *Coke* I, supra, 376 F.3d, at 127-128; and in Notice, *Application of the Fair Labor Standards Act to Domestic Service*, 66 Fed. Reg. 5481, 5482-5485 (Jan. 19, 2001). Such a review of legislative history is proper under this Court's recent decision in *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581 (2004), where Chevron deference to an agency's "statutory interpretation is called for only

when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics*, supra, 540 U.S., at 600. To engraft upon the concept of "domestic service workers" the additional requirement that these persons must be trained professional health or social professionals, as did the courts in *Salyer* v. *Ohio Bureau of Workers' Compensation*, 83 F.3d 784, 787-788 (6th Cir.) *cert. denied* 519 U.S. 964 (1996); *Cox* v. *Acme Health Services*, 55 F.3d 1304, 1306-1310 (7th Cir. 1995); *McCune* v. *Oregon Senior Services Division*, 894 F.2d 1107 (9th Cir. 1990); and *Terwilliger* v. *Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1301-1303 (N.D. Okla. 1998) *further proceedings before Magistrate Judge*, 42 F.Supp.2d 1231 (N.D. Okla. 1999); is to clumsily impose an incongruent and anomalous concept onto something which was quite clearly contrary to the original Congressional intent of the 1974 amendments.

The Fifth Circuit followed the *Salyer*, *Cox*, *McCune* and *Terwilliger* decisions in requiring that a domestic services worker be the recipient of medical training. This holding is in direct conflict with the express intent of Congress to extend broad coverage of the Fair Labor Standards Act over domestic service workers. There is not a single reference to specialized training in the statute, its legislative history, and mention of it in § 552.6 is in the context of a medically-trained person who happens to be providing "companionship services," a concept distinct and discrete from the broader category of domestic service workers. To limit the concept of "domestic care worker" to persons who are possessed of specialized training is to ignore the broader category of a "care worker." This anomalous and illegal employment of the narrow

"companionship services" exemption so as to swallows up the broad protection of the Act and flies in the face of the remedial and social improvement purposes of the statute as a whole, the provisions of which, as this Court held more than 60 years ago,

> are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.

Tennessee Coal, supra, 321 U.S., at 597.

CONCLUSION

For the above and foregoing reasons, petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petitioner further respectfully requests that this case be consolidated with *Long Island Care at Home, Ltd.* v. *Coke*, No. 06-593, O.T. 2006, which has already been granted certiorari review by this Court, because of the identity of isssues in that case and the present petition.

Respectfully submitted,
Donald Juneau
P.O. Box 1857,
(214 S.W.Railroad Avenue)
Hammond, Louisiana

70404-1857
Telephone:[985] 429-0830
FAX: [985] 542-0046
e-mail: Mozarabica@aol.com
Counsel for Petitioner

(any footnotes trail end of each document)

No. 06-30856 Summary Calendar
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
WILHELMENA COOK,

Plaintiff-Appellant,
Versus

DIANA HAYS AND OPTIONS, INC.
Defendants-Appellees,

ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR,
Amicus Curiae.

2006 U.S. App. LEXIS 32070;153 Lab. Cas. (CCH) P35,236;12 Wage & Hour Cas. 2d (BNA) 228

December 29, 2006, Filed

NOTICE: RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: For WILHELMENA COOK, Plaintiff - Appellant: Donald Juneau, Hammond, LA.

For DIANA HAYS, OPTIONS, INC. Defendants - Appellees: Thomas P Hubert, Jane Henican Heidingsfelder, Jones Walker, New Orleans, LA.

For ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR, Amicus Curiae: Joanna Hull, US Department of Labor, Occupational Safety & Health Adm, Washington, DC.

JUDGES: Before JOLLY, DENNIS, and CLEMENT, Circuit Judges.

OPINION: PER CURIAM: *

Plaintiff-appellant, Cook, appeals the district court's grant of a partial summary judgment in favor of defendant-appellees on her Fair Labor Standards Act ("FLSA") claim for overtime. Cook was employed by Options, Inc., a non-profit corporation that provides home health care, from 1998 to 2003 and received overtime pay until July 21, 2000. Cook, though trained as a radiologist technician, served as a full-time direct-care worker during her employ, wherein she completed tasks set out in the comprehensive Plan of Care. Accordingly, she performed the following tasks for clients: provided simple physical therapy, prepared their meals, assisted with their eating, baths, bed-making, and teeth brushing, completed housework (accounting for less than 5 percent of her time), and accompanied them on walks, to doctor visits, to Mass, and to the grocery store.

Generally, the FLSA requires that an employee be compensated at a rate of one and one-half times his regular pay for hours in excess of forty in a single work week. However, certain employees are exempted from coverage, including ". . . any employee employed in domestic service employment to provide companionship services for individuals who (because of age or

infirmity) are unable to care for themselves. . . ." 29 U.S.C. § 213(a)(15) . 29 C.F.R. § 552.6 defines "companionship services," excluding those that require and are performed by trained personnel. At issue in this appeal is whether Cook provided "companionship services" so as to be exempted.

We find that Cook's duties qualify as companionship services. See e.g., *Salyer v. Ohio Bureau of Workers' Compensation*, 83 F.3d 784 (6th Cir. 1996); *Cox v. Acme Health Services, Inc.*, 55 F.3d 1304 (7th Cir. 1995); *McCune v. Oregon Senior Services Div.*, 894 F.2d 1107 (9th Cir. 1990). Further, Cook is not a "trainod professional." See id; see also *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294 (N.D.Okla.1998). Accordingly, she is not covered by the FLSA and does not fit into the "trained personnel" exception. Therefore, she is not entitled to overtime pay.

For the foregoing reasons, we AFFIRM.

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

CIVIL ACTION NO 04-3032 SECTION M

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

WILHELMENA COOK VERSUS DIANA HAYS, THE XYZ INSURANCE COMPANY, OPTIONS INC., AND THE ABC INSURANCE COMPANY

May 31, 2006, Decided
May 31, 2006, Filed

COUNSEL: Wilhelmena Cook, Plaintiff, Pro se, Hammond, LA.

For Wilhelmena Cook, Plaintiff: Donald J. Juneau, Donald J. Juneau, Attorney at Law, Hammond, LA.

For Diana Hays, Options Inc, Defendants: Thomas P. Hubert, Jane Henican Heidingsfelder, Joseph F. Lavigne, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA.

JUDGES: Peter Beer, United States District Judge.

OPINION BY: Peter Beer

OPINION:

ORDER

Before the Court is Plaintiffs Motion for Partial Summary Judgment and Defendants' Cross Motion for Summary Judgment which came for hearing on May 24, 2006, on the briefs. After consideration of the motions, the briefs and the applicable law, the Court denies

plaintiff's motion and grants defendants' motion, in part.

FACTS:

This is a claim for overtime payments under the Fair Labor Standards Act (FLSA), *29 U.S.C. § 213(b)* and penalties and fees based upon *La. R.S. 23:631* and *632*, as well as a claim for damages for defamation, business libel and slander.

Plaintiff Wilhelmena Cook began working at Options Inc., (Options) a non-profit corporation in Hammond, Louisiana that provides home health care on March 24, 1998. She is trained as a radiology technician, but did not work at this capacity at Options. She is not a registered nurse or practical nurse and has no other specialized training or experience, except CPR and first aid certification. Upon completion of a two-week orientation provided by Options, she was given a handbook containing the Options' policies and procedures. Cook was responsible for preparing meals, assisting her client with baths, transportation, social functions, grocery store and doctor's visits. Cook testified that she assisted the client with daily exercises and completion of the daily schedule that was outlined in a Plan of Care required by the state and supervised by a registered nurse. She testified that she spent less than five percent of her time performing housework. Cook had several disciplinary issues while working for Options, was suspended three times during her tenure, and was terminated on January 28, 2003.

Cook was compensated at $ 6.43 per hour. Overtime work is compensated at time and half of the regular hourly rate. She testified that she received overtime

pay before July 21, 2000, but not after that time. She claims that for this period of employment she is entitled to receive approximately $ 48,000 in overtime compensation.

Defendants claim that, based upon her job responsibilities and lack of specialized training and skill, Cook does not qualify for overtime pay as she fits into the companionship exemption for the FLSA overtime provision.

ANALYSIS:

Cook is exempt from FLSA overtime provisions because, while employed by Options as a direct care assistant, she provided mainly companionship services within the meaning of *29 U.S.C. § 213(a)(15)* and *29 C.F.R. § 552.6*. Cook's training and duties fall short of her being considered "trained personnel"; therefore, the defendants are entitled to the companionship services exemption as a matter of law.

ACCORDINGLY, Plaintiff's motion for Partial Summary Judgment is **DENIED.** Defendant's Motion for Summary Judgment regarding the FLSA is **GRANTED.** Plaintiff's pendant state claims are **REMANDED** to the 21st Judicial District Court of Tangipahoa Parish.

New Orleans, Louisiana, this 31st day of May, 2006.

Peter Beer

United States District Judge

2/15/2007

No. 06-30856 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILHELMENA COOK,

Plaintiff-Appellant,

Versus

DIANA HAYS AND OPTIONS, INC.

Defendants-Appellees,

ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before JOLLY, DENNIS, and CLEMENT, Circuit Judges

PER CURIAM: IT IS ORDERED that the petition for rehearing is Denied.

Supreme Court, U.S.
FILED
AUG 1 0 2007
OFFICE OF THE CLERK

No. 06-1421

In The
Supreme Court of the United States

BRIDGES COOK, Representative of the Estate of Wilhelmena Cook, deceased,

Petitioner,

vs.

DIANA HAYS and OPTIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR CERTIORARI

DONALD JUNEAU
Counsel for Petitioner
P.O. Box 1857,
214 S.W. Railroad Avenue
Hammond, Louisiana 70404-1857
Telephone: [985] 429-0830
FAX: [985] 542-0046
e-mail: Mozarabica@aol.com

August, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the exemption for "sitters" and "companions" embodied in the 1974 amendment of the Fair Labor Standards Act, 29 U.S.C. § 231(a)(15), applies to domestic service workers who are employed full-time by a third-party employer, but who are not the recipients of specialized medical or social-welfare training?

2. Whether the Regulation of 29 C.F.R. § 552.6 has been correctly applied to the Petitioner, as to require specialized medical or social-welfare training for direct care-workers and whether such an interpretation is entitled to deference under this Court's holding in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as modified by *United States* v. *Mead Corp.*, 553 U.S. 218 (2001)?

PARTIES TO THE PROCEEDINGS

Petitioner is Bridges Cook, the legal representative of the Succession of Wilhelmena Cook, deceased.

Respondents are Diana Hays and Options, Inc., a Louisiana Corporation.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 15.8 of the Supreme Court, petitioner files this Brief supplementing the Petition for Certiorari.

In a letter to the Clerk of Court, dated June 22, 2007, counsel for respondents waived the filing of an opposition to the *Petition for Certiorari*, because counsel perceived that the *Petition* was based upon an "identity of the issues in this case and a case just decided by this Court, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. ___; 2007 WL 1661472 (June 11, 2007)." Letter from Thomas Hubert to Clerk of the Supreme Court (June 22, 2007). Although petitioner did state in the *Petition* that the issues "are identical," *see Petition* at 4, this is not quite correct. The *Questions Presented* make clear that this case presents issues different from those decided by this Court in *Coke*. The *Petition* went into some detail that the petitioner, the late Ms Wilhelmena Cook, was not claiming under the "companionship" rubric of 29 U.S.C. § 213(a)(15), 29 C.F.R. § 552.6 and 29 C.F.R. § 552.109(a), but rather as a domestic care-giver under 29 C.F.R. § 552.3. *Petition*, pp. 4, 7-10.

The record below shows that Ms Cook performed extensive domestic care services, and by no stretch of the term could she be considered to have provided "companionship" services. In this record is Ms Cook's deposition, where she was subjected to a lengthy and thorough interrogation by counsel for respondents as to what she did during her work-day. Ms Cook was compelled to follow a lengthy and detailed "Plan of Care," which minutely directed her daily activities with her client. This "Plan of Care," as respondents conceded, was promulgated by the

Louisiana Department of Hospitals, which in turn based it upon federal regulations, since the client was the recipient and beneficiary of federal medicare and medicaid funds.

The *Petition* also made it clear that the cases relied upon by the lower courts, *Salyer* v. *Ohio Bureau of Workers' Compensation,* 83 F.3d 784, 787-788 (6th Cir.), *cert. denied,* 519 U.S. 964 (1996); *Cox* v. *Acme Health Services*, 55 F.3d 1304, 1306-1310 (7th Cir. 1995); *McCune* v. *Oregon Senior Services Division*, 894 F.2d 1107 (9th Cir. 1990); and *Terwilliger* v. *Home of Hope, Inc.,* 21 F.Supp.2d 1294, 1301-1303 (N.D. Okla. 1998) *further proceedings before Magistrate Judge*, 42 F.Supp.2d 1231 (N.D. Okla. 1999), all went off on the notion that a domestic care-provider must be a licentiate or recipient of specialized medical training. *Petition*, pp. 9-10. But that is quite clearly *not* what is required in the statute, 29 U.S.C. § 213(a)(13); the regulation, 29 C.F.R. § 552.3; and the legislative history of the 1974 Fair Labor Standards Act Amendments. There is not a word in the statute, regulation or congressional proceedings which supports the engrafting of professional health or social welfare professional training onto the general concept of "domestic care-giver." The regulatory draftspersons drew up 29 C.F.R. § 552.6 to prevent the "companionship" exemption from covering trained medical workers. In other words, it was an exemption within the exemption which brought these individuals under the Fair Labor Standards Act. This is common-sense reading of § 552.6, and it should not be used in a tortured manner as a basis to disqualify direct-caregivers otherwise covered by the Act's 1974 amendment.

This Court's unanimous decision in *Coke* began its factual analysis by stating that Ms Coke was "a domestic worker who provides 'companionship' services to elderly

and infirm men and women * * * ." *Coke*, supra, 2007 WL 1661472, at *4. It then began a long and quite involved discussion on the applicability and enforceability of §§ 552.6 and 552.109(a), noting the tension between these provisions and § 552.3. *Coke*, supra, 2007 WL 1661472, at *7-*9.

All of this analysis was in the context of the "companionship" exemption, and the Court concluded that the regulations were validly promulgated and controlled the situation of Ms Coke. Petitioner Cook, on the other hand, does not challenge the validity of the regulations, but rather there application. Petitioner never contended that she was a "companion." She insisted that she was a *domestic service worker*, and that her duties clearly put her under § 552.3. Respondents never disputed this; instead, they argued that Ms Cook was a "companion," as contemplated by § 552.6, and their asseveration was that her lack of specialized professional training placed her into that companionship category. Neither the District Court nor the Court of Appeals even mentioned 25 C.F.R. § 552.109(a), the regulation under attack in *Coke*, but rather held, without any support in the record, that petitioner was a "companion," because she had not been a species of "trained personnel," and her "training and duties fall short of her being considered 'trained personnel.'" *Cook* v. *Hays*, 2006 U.S. App. LEXIS 302070, at *2 (5th Cir. 2006), *aff'g*, 2006 U.S. Dist. LEXIS 36009, at *1-*3 (E.D. La. 2006). Nor was there any discussion in these opinions about the deference due under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984).

The question whether particularized medical training was a prerequisite for inclusion under the direct care-giver

rubric was not before the Court in *Coke*, but is squarely presented in this case. A careful reading of § 552.6 shows that the specialized medical training requirement was drafted to take trained professional workers out from under the "companionship" exemption, so that this category of persons would not be subject to the exclusion. Petitioner's position is one who contests the *application* of a regulation, not a facial attack upon it, and, as this Court recently noted, petitioner has mounted "a proper as-applied challenge in a discrete case." *Gonzales* v. *Carhart*, 551 U.S. ___, 127 S.Ct. 1610, at 1638, 1639 (2007) (citations omitted). This challenge is based upon an extensive factual record, not disputed by respondents, which demonstrates beyond any cavil that Ms Cook did not function as a "companion" or a "sitter": she was a direct care-giver covered by the Fair Labor Standards Act.

CONCLUSION

For the above and foregoing reasons, petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DONALD JUNEAU
P.O. Box 1857,
214 S.W. Railroad Avenue
Hammond, Louisiana
70404-1857
Telephone: [985] 429-0830
FAX: [985] 542-0046
e-mail: Mozarabica@aol.com
Counsel for Petitioner

August, 2007